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No. 99-579

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION; and JOHN A. EDWARDSON,

Petitioners,

—v.—

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

Peter C. Hein
Counsel of Record
Andrew C. Houston
Michael A. Charish
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

William F. Conlon
Richard B. Kapnick
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for Respondents

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QUESTION PRESENTED

Does the Employee Retirement Income Security Act ("ERISA") affirmatively authorize a private cause of action against a *non*fiduciary party-in-interest on the theory that a nonfiduciary's entry into a "prohibited transaction" constitutes a "direct" violation by the nonfiduciary of ERISA § 406(a), 29 U.S.C. § 1106(a), notwithstanding that: (a) the statutory language of § 1106(a) ("a fiduciary ... shall not cause the plan to engage" in a prohibited transaction) prohibits conduct only by fiduciaries; (b) the legislative history demonstrates that Congress specifically considered imposing civil liability on *non*fiduciary parties-in-interest for participating in prohibited transactions, but opted not to; and (c) this Court has expressed an unwillingness to infer private causes of action under ERISA?

There is also an alternative ground for affirmance here, even if this Court were to allow such an implied private cause of action, that presents a further question: whether liability under any such implied cause of action may be imposed upon a nonfiduciary party-in-interest even if it did *not* know that the fiduciary who caused the plan to engage in the transaction was violating § 1106(a); here, petitioners failed to proffer admissible evidence that respondent Salomon knew that a fiduciary was violating § 1106.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The successor-in-interest to respondent Salomon Brothers Inc is Salomon Smith Barney Inc. Both Salomon Smith Barney Inc. and respondent Salomon Brothers Realty Corp. are wholly owned by Salomon Brothers Holding Company Inc., which in turn is wholly owned by Salomon Smith Barney Holding Inc., which in turn is wholly owned by Citigroup Inc., whose stock is publicly traded.

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TABLE OF SELECTED ABBREVIATIONS

App.	Appendix accompanying Petition for Writ of Certiorari
Pet.	Petition for Writ of Certiorari
RA	Respondents' Appendix (attached hereto)
Sal. C.A. App.	Salomon's Supplemental Appendix in the Court of Appeals

STATUTORY PROVISIONS INVOLVED

Supplementing (or providing in more complete form) the provisions that petitioners identify (Pet. 2), pertinent portions of 29 U.S.C. §§ 1104, 1105, 1106, 1108, 1109 and 1132 are reproduced in the Respondents' Appendix at RA1-18.

STATEMENT OF THE CASE

In a unanimous decision, the Seventh Circuit held that ERISA does not provide a private cause of action against a *non*fiduciary party-in-interest under 29 U.S.C. § 1106, rejecting petitioners' theory that such nonfiduciary's entry into a "prohibited transaction" constitutes a "direct" violation of § 1106(a). The panel circulated its opinion to all judges of the court in regular active service, recognizing that the decision created a circuit split. Only one judge voted to rehear the case *en banc*. *See* App. 13a n.1.

Petitioner Ameritech Pension Trust ("APT") is a trust for two employer-funded defined-benefit plans sponsored by petitioner Ameritech Corporation ("Ameritech Corp."). *See* Sal. C.A. App. 295, 354. This case arises from the purchase by APT from respondent Salomon of participation interests in cash flow and appreciation of four groups of motel properties. As the Court of Appeals observed, these purchases followed extensive negotiations between Salomon, which offered the participation interests for sale, and National Investment Services of America ("NISA"), investment manager and fiduciary of APT, and Ameritech Corp. *See* App. 2a. In the early 1990s, the nationwide market for hotel and motel real property collapsed; APT incurred losses on the investments and petitioners then sued Salomon. *See* App. 2a. The operative Second Amended Complaint contained 12 counts, 11 of which the district court dismissed. *See* App. 14a-55a; Sal. C.A. App. 58-85.[1]

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[1] Petitioners are sometimes collectively referred to herein as "Ameritech" and respondents as "Salomon". References to "App. ___" are to the specified pages in petitioners' appendix before this Court.

The case was before the Court of Appeals on a § 1292(b) interlocutory appeal. In the June 1996 Order that was the subject of the interlocutory appeal, the district court granted summary judgment dismissing two of Ameritech's three ERISA counts, but denied summary judgment as to a portion of the third. Count I, which alleged that Salomon was a fiduciary that had breached its fiduciary duties, was dismissed because Ameritech had not presented admissible evidence that Salomon was a fiduciary of APT. *See* App. 20a-30a. Count III alleged that fiduciary NISA (*not* named as a defendant) breached its fiduciary duties by causing APT to enter into prohibited transactions with Salomon in violation of § 1106 and that Salomon was liable for having "knowingly participated" in NISA's breach of fiduciary duty. The district court dismissed Count III because it concluded that nonfiduciaries cannot be found liable for knowing participation in another person's fiduciary breaches. *See* App. 51a-52a.

Count II alleged that Salomon was a *fiduciary* that had "caused the Plan to engage in" § 1106(a) prohibited transactions. Sal. C.A. App. 296, 302-03. The district court dismissed any claims in Count II "which are premised on an alleged breach of fiduciary duty". App. 55a. However, in the district court plaintiffs had recharacterized their Count II claim as (at least in part) a purported "direct" cause of action for violation of § 1106, assertable against Salomon as a *non*fiduciary party-in-interest that entered into a prohibited transaction (even if it did *not* know that the fiduciary who caused the plan to engage in the transaction had violated § 1106). The district court upheld that recharacterized claim. *See* App. 30a-41a. Count II contains no allegation that someone *other than* Salomon was a fiduciary who caused APT to engage in "prohibited transactions" in violation of § 1106. *See* Sal. C.A. App. 302-04.

References to "Sal. C.A. App. ___" are to the specified pages in Salomon's Supplemental Appendix in the Court of Appeals; respondents would be pleased to provide additional copies to this Court if requested.

On the interlocutory appeal from the June 1996 order, Salomon sought reversal of the district court's ruling upholding Count II in part (the purported "direct" § 1106 cause of action against a nonfiduciary party-in-interest). Ameritech did *not* cross-appeal or otherwise contest the dismissal of Count I (breach of fiduciary duty), Count II (to the extent premised on an alleged breach of fiduciary duty) or Count III (participation-in-fiduciary-breach).

At no point was there a determination of Ameritech's allegations that Salomon was a party-in-interest or that the transactions were nonexempt prohibited transactions, and (as the Seventh Circuit observed) Salomon disputes these matters. *See* App. 6a. In addition, were there to be further proceedings, Salomon would also dispute many of the "facts" asserted by Ameritech. *See* Pet. 6-8. For purposes of the interlocutory appeal, the Seventh Circuit assumed the validity of Ameritech's allegations, but ordered summary judgment for Salomon because it held that a *non*fiduciary party-in-interest cannot be liable under § 1106 for entering into a prohibited transaction. *See* App. 12a-13a.

REASONS FOR DENYING THE WRIT

Several considerations specific to this case compromise its utility as a vehicle for review of whether ERISA affirmatively authorizes a private cause of action against a nonfiduciary party-in-interest for participation in a prohibited transaction.

- *First*, Ameritech relies here *only* on the claim that a nonfiduciary party-in-interest's entry into a "prohibited transaction" constitutes a "direct" violation by the nonfiduciary of § 1106. In the Court of Appeals, Ameritech disclaimed and waived any claim that a nonfiduciary party-in-interest may be held liable for its participation in a *fiduciary's breach* of § 1106. Yet — in light of this Court's recent decisions, including *Mertens* v. *Hewitt*, 508 U.S. 248 (1993), and *Lockheed* v. *Spink*, 517 U.S.

882 (1996) — a participation-in-fiduciary-breach claim (such as that urged in the *Mertens dissent*) may be the only even potentially viable grounds for imposing liability upon nonfiduciary parties-in-interest. It would not serve this Court well to address the validity of a "direct" violation claim in a case where, as a result of Ameritech's disclaimer and waiver, the issue of the validity of a claim for participation in a fiduciary's breach of § 1106 is not before this Court. *See* Point I(A), *infra*.

- *Second*, the decision below was rendered on a § 1292(b) interlocutory appeal, and further proceedings may alter the posture of this case. Indeed, Ameritech has suggested that it may try to revive previously dismissed claims that Salomon was a fiduciary; if Ameritech succeeds in this effort (over Salomon's objections), the issue of nonfiduciary liability raised in the Petition could be mooted. *See* Point I(B), *infra*.

- *Third*, there is an independent ground for affirmance here: even if the putative private cause of action against a nonfiduciary party-in-interest exists, Ameritech did not offer admissible evidence sufficient to satisfy what must be the scienter requirement of any such cause of action. *See* Point I(C), *infra*.

In view of "the number of reported decisions" (Pet. 11) concerning the issue of nonfiduciary liability for participation in prohibited transactions, this Court is likely to have ample opportunity to address the question presented in other cases that may arise in a more appropriate posture for review.

Furthermore, particularly in light of the foregoing considerations, it is appropriate to permit further development in the Courts of Appeals of the issues surrounding nonfiduciary liability for participation in prohibited transactions. *See* Point II, *infra*. Finally, there is no compelling reason to review this specific case. The Seventh Circuit's decision does not compromise ERISA enforcement (*see* Point III, *infra*), and correctly adheres to the plain language of the statute and this Court's precedents that decline to imply private rights of action under ERISA (*see* Point IV, *infra*).

I. THE PROCEDURAL HISTORY AND CURRENT POSTURE OF THIS CASE COMPROMISE ITS UTILITY AS A VEHICLE FOR REVIEW.

A. Ameritech's disclaimer and waiver of any claim that a nonfiduciary party-in-interest may be liable for participating in a fiduciary's breach of § 1106.

1. Ameritech's disclaimer and waiver. The Petition makes clear that Ameritech presses in this Court *only* a claim that a nonfiduciary party-in-interest may be held liable for its supposed "direct" violation of § 1106: "The relevant claim for present purposes is Count II." Pet. 8. As noted (p. 2, *supra*), any claim in Count II "premised on an alleged breach of fiduciary duty" was dismissed (and such dismissal was not contested on appeal). And, in any event, Count II contains no allegation that any party *other than* Salomon caused APT to engage in "prohibited transactions" in violation of § 1106, much less an allegation that Salomon is liable for participating in a fiduciary's breach.

In addition, the Petition does *not* contest the considered dictum of *Mertens* v. *Hewitt*, 508 U.S. at 253-55 & n.5 — which the Petition acknowledges has been "widely followed by the lower courts" — that "no cause of action is available under ERISA against a non-fiduciary for assisting a fiduciary in violating its fiduciary obligations under the statute". Pet. 16. Instead, Ameritech argues only that the absence of a participation-in-fiduciary-breach claim does not necessarily preclude the existence of a "direct" claim. *See* Pet. 16-17.

Moreover, in the Court of Appeals, Ameritech waived any participation-in-fiduciary-breach claim and thus could not properly advance such a claim in this Court were *certiorari* to be granted. Ameritech's Count III did plead a claim that

Salomon was liable for participating in a fiduciary's breach of duty. As the district court summarized:

> Count III alleges that Salomon *knowingly participated in NISA's breach of its fiduciary duties to APT* by selling the interests in the fee agreements to NISA for APT's benefit. In other words, *plaintiffs contend that Salomon is secondarily liable for its knowing participation in NISA's involvement in a § 1106 prohibited transaction.* (App. 51a (emphasis added)).

The district court dismissed Count III, explaining that — although it upheld Count II in part since "§ 1106 can be read to affirmatively impose an obligation on parties in interest to avoid [prohibited] transactions" — Count III failed because "status as a party-in-interest ... does not subject such persons to derivative liability for another's violation of ERISA". App. 51a.

Ameritech did not cross-appeal from, or otherwise seek to raise in the Court of Appeals, that aspect of the district court's June 1996 order that dismissed Count III. Indeed, in the Court of Appeals, Ameritech disavowed reliance on any participation-in-fiduciary-breach theory and, instead, consistently emphasized that its theory of § 1106(a) liability was "direct", *not* secondary. *See, e.g.*, Brief of Appellees at 37 ("As the district court made clear, 'Salomon's liability [under Count II] is premised on a direct violation of [§ 1106], and not, as Salomon argues, on secondary liability for knowing participation in NISA's breach.'"). The Seventh Circuit did not pass upon Count III, and in fact noted that Ameritech had waived its participation-in-fiduciary-breach claim.[2]

[2] The Seventh Circuit noted that "plaintiffs have wisely abandoned their claim against Salomon for participating in a breach of fiduciary duty under § 1104." App. 5a-6a. This is a reference to Count III, where Ameritech asserted that NISA violated its fiduciary duties by entering into § 1106 prohibited transactions with Salomon, and that Salomon could therefore be sued under § 1104 for knowing participation in NISA's fiduciary breach. *See, e.g.*, App. 51a; Sal. C.A. App. 305.

This Court consistently has refused to consider issues litigated in the district court but not appealed to the court of appeals, and has even stated that it "cannot" consider an issue waived in that fashion. *See, e.g., Boeing* v. *Van Gemert*, 444 U.S. 472, 479 n.5 (1980) ("Since [petitioner] did not appeal it, we cannot now consider whether the judgment [of the district court] was in error"); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 244 (1985); *Kosak* v. *United States*, 465 U.S. 848, 850 & n.3 (1984); *Marsh* v. *Chambers*, 463 U.S. 783, 793 n.15 (1983); *Delta Air Lines* v. *August*, 450 U.S. 346, 362 (1981); *Adickes* v. *S.H. Kress*, 398 U.S. 144, 147 n.2 (1970); *see also, e.g., Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument "inadequately preserved in the prior proceedings") (citing *Adickes*).

Furthermore, where "central issues on which resolution of the question presented may well turn cannot be reached or resolved" by this Court because the petitioner failed to raise them in the Court of Appeals, this Court has dismissed a writ of *certiorari* as improvidently granted. *Equal Employment Opportunity Comm'n* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986). And here, what Ameritech waived was not only an argument or an issue rejected by the district court, but also portions of Ameritech's original claims for relief; and here respondents are expressly identifying the waiver and objecting to any assertion in this Court of any participation-in-fiduciary-breach claim.

2. In light of *Mertens* and *Spink*, a participation-in-fiduciary-breach claim may be the only even potentially viable grounds for imposing liability upon nonfiduciary parties-in-interest. In *Mertens*, this Court held that § 1132(a)(3) does not authorize compensatory damages, but instead permits only "equitable relief" in a suit against a nonfiduciary who knowingly participates in a fiduciary's breach. *See* 508 U.S. at 251, 255-63. In considered dictum, the majority also expressed pointed doubt about the threshold issue: whether a nonfiduciary's participation ("knowing or unknowing") in a fidu-

ciary's breach of duty violates ERISA, and thus whether ERISA "affirmatively authorizes" a private cause of action against such a nonfiduciary — reemphasizing this Court's "unwillingness to infer causes of action in the ERISA context". 508 U.S. at 253-55 & n.5. By contrast, Justice White's dissent expressed the view that there could be a private cause of action against a nonfiduciary for knowing participation in a fiduciary breach. *See* 508 U.S. at 266 n.1. One year later, this Court reinforced the significance of the majority's considered dictum in *Mertens* when it reiterated that the "omission of knowing participation liability in ERISA 'appears ... deliberate'" and observed that *Mertens* "rejected" the argument that a "knowing participation cause of action ... should be available under ERISA". *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 175, 184 (1994).

In light of this Court's opinions in *Mertens* and *Central Bank*, Ameritech may correctly have viewed continued advocacy of a participation-in-fiduciary-breach theory of liability as an uphill battle. Nevertheless, this Court's subsequent decision in *Lockheed* v. *Spink*, 517 U.S. 882 (1996), makes clear that the participation-in-fiduciary-breach theory waived by Ameritech may be the only even potentially viable grounds for imposing liability on a nonfiduciary party-in-interest that enters into a § 1106 prohibited transaction. In *Spink*, the Ninth Circuit had held the defendant liable as a party-in-interest that benefited from a § 1106 prohibited transaction. This Court reversed, ruling that the Ninth Circuit "erred by not asking whether fiduciary status existed in this case" on the part of the defendant employer-plan sponsor "before it found a violation of [§ 1106(a)(1)]." *Id.* at 889. This Court held that: "[I]n order to sustain an alleged transgression of [§ 1106(a)], a plaintiff must show that a *fiduciary caused* the plan to engage in the allegedly unlawful transaction." *Id.* at 888 (emphasis added); *see also id.* ("[§ 1106] prohibits *fiduciaries*") ("[§ 1106(a)(1) regulates the conduct of plan *fiduciaries*"); *id.* at 889 n.3 ("the *only* transactions rendered *impermissible* by [§ 1106(a)] are transactions *caused by fiduciaries*"); *id.* at 893 ("[§ 1106(a) prohibits *fiduciaries*") (emphasis added).

After *Spink*, Ameritech conceded that "*fiduciary causation* is a *prerequisite* for nonfiduciary party-in-interest liability under [§ 1106]" and that "[t]he presence of a party-in-interest alone is not enough". Sal. C.A. App. 478-79 (emphasis added). In other words, in light of *Spink*, and as Ameritech conceded, any liability of a nonfiduciary party-in-interest — were it to exist — must be *dependent upon* the court first finding that a fiduciary violated § 1106. But any such claim dependent upon a finding that a fiduciary violated § 1106 would in substance be the very secondary-liability, participation-in-fiduciary-breach claim that Ameritech in this case has waived. If § 1106 imposed an *independent* duty on nonfiduciary parties-in-interest, how could it logically be a prerequisite in every case to find that a fiduciary violated § 1106?[3]

The decisions from other courts of appeals on which the Petition relies do not alter the conclusion that a participation-in-fiduciary-breach theory may be the only potentially viable theory remaining after *Lockheed* v. *Spink*. In fact, one of those decisions, *LeBlanc* v. *Cahill*, 153 F.3d 134 (4th Cir. 1998), sometimes even refers to the private cause of action it upheld as "knowing participation in *an ERISA fiduciary's breach* of

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[3] For example, the distinction in the securities field between direct Rule 10b-5 claims (for which a private right of action exists) and dependent secondary-liability claims (as to which *Central Bank* rejected a private right of action) has turned on whether proof of a violation by another is required: (1) "primary violators" could be sued for their own misconduct irrespective of conduct of others, but (2) a dependent secondary claim had required the existence of a "primary violation." *See, e.g.*, *Central Bank*, 511 U.S. at 168, 194 ("the existence of a primary violation" was an element of the 10b-5 aiding-and-abetting claim recognized in the lower courts); Loss & Seligman, *Securities Regulation*, Chap. 11c at 4479 (3d ed. 1990) (same); *DiLeo* v. *Ernst & Young*, 901 F.2d 624, 628 (7th Cir. 1990) ("there can be no liability on an aiding-and-abetting theory unless ... someone committed a primary violation").

[§ 1106]". *Id.* at 149-151 (emphasis added). The other courts of appeals decisions either pre-date *Spink* or do not consider the implications of *Spink's* ruling that a fiduciary's breach of its § 1106 duties is a prerequisite to any § 1106 claim.

3. Ameritech's disclaimer and waiver compromise the utility of this case as a vehicle for review. Even if one were to assume (hypothetically) that both a "direct" violation claim and a participation-in-fiduciary-breach claim were potentially viable theories, the fact remains that in this case *only* the "direct" violation claim would be before this Court — and *not* the participation-in-fiduciary-breach theory urged in the *Mertens* dissent. Thus, Ameritech's disclaimer and waiver would at the very least pose impediments to this Court's full consideration of the subject of claims against nonfiduciary parties-in-interest for entering into prohibited transactions. This Court should await a more appropriate case: a case that is not encumbered with the disclaimer and waiver problems posed here.

B. The decision below was rendered on a § 1292(b) interlocutory appeal.

The case at bar arises in the context of a § 1292(b) interlocutory appeal decided by the Seventh Circuit. Further proceedings may alter the posture of this case. Ameritech has asserted that, after final judgment is entered in the district court, it may seek to appeal the district court's "fiduciary rulings" in the June 1996 Order. 7/26/99 Motion of Plaintiffs-Appellees to Stay Mandate, at 5, ¶ 8.[4] The issue of *non*fiduciary liability raised in the Petition could be mooted if (over Salomon's opposition) Ameritech were to succeed on such an appeal and ultimately establish that Salomon is liable as a fiduciary. Also,

[4] Salomon's position is that Ameritech has waived any right to appeal or otherwise revisit the rulings in the June 1996 Order adverse to Ameritech, including the district court's dismissal of any claim premised upon Salomon allegedly having been a fiduciary or upon an alleged breach of fiduciary duty.

Ameritech has further stated that on remand to the district court it will seek to have that court reconsider its prior determination that Ameritech's state law claims are preempted. *See id.*

In addition, the interlocutory posture of this case may render it a less than optimal vehicle for review by this Court of the issues surrounding nonfiduciary liability for entering into prohibited transactions, as contrasted with alternative cases arising after final judgment. For example, the question presented in the instant Petition is whether there exists a private cause of action (i) against a nonfiduciary party-in-interest (ii) for entering into nonexempt prohibited transactions. Here, there has been no determination that (i) Salomon *was* a party-in-interest or (ii) that the transactions *were* nonexempt prohibited transactions. *See* p. 3, *supra*. Also, as discussed below, the issue of the scienter requirement for the asserted private cause of action remains to be addressed.

C. Ameritech's failure to proffer admissible evidence that Salomon knew that a fiduciary was violating § 1106 provides an independent ground to affirm the judgment below.

In the Seventh Circuit, Salomon argued in the alternative that — even if the posited private cause of action exists — a plaintiff must prove that the nonfiduciary party-in-interest knew at the time of the transaction that the fiduciary who caused the plan to engage in the transaction was violating § 1106(a). Yet Ameritech had presented *no* admissible evidence that Salomon had the requisite knowledge. The Seventh Circuit never reached this alternative ground. Nevertheless, were the Court to grant *certiorari*, Salomon would be entitled to rely on this ground for affirmance. *See, e.g., Jones* v. *United States*, 119 S. Ct. 2090, 2106 (1999); *United States* v. *X-Citement Video*, 513 U.S. 64, 78 (1994).[5]

[5] Contrary to Petitioners' assertion (Pet. 6 n.3), since this case arises in the context of summary judgment, the facts alleged by petitioners should *not* be taken as proven unless they are supported by admis-

1. Knowledge that a fiduciary was violating § 1106(a) must be an element of any § 1106(a) claim against a nonfiduciary party-in-interest. Once the district court chose to imply a cause of action, it then had to discern its elements (including the level of scienter required) — but of course had no statutory statement of the elements to rely upon. The result was the district court's conclusion that a nonfiduciary party-in-interest can be liable even if it did *not* know that the fiduciary violated § 1106(a). *See* App. 42a.

For the fiduciaries § 1106(a) does expressly regulate, § 1106(a) includes an express scienter standard ("knows or should know"). And the *rejected* Senate bills that would have imposed civil liability on nonfiduciary parties-in-interest *did* include express scienter standards. *See* RA19-21. The silence of § 1106(a), as enacted, concerning any scienter standard applicable to a *non*fiduciary further underscores that ERISA does not provide the cause of action Ameritech posits.

In any event, *Spink* makes clear that a nonfiduciary party-in-interest cannot be liable unless the court first finds that a fiduciary violated § 1106. *See* Point I(A)(2), *supra*. It follows from the dependent nature of any hypothetical "§ 1106 claim" against a nonfiduciary party-in-interest that knowledge by it that the fiduciary was violating § 1106 must be an element. Knowledge of the fiduciary's breach was required for the *knowing*-participation claim that the *Mertens* majority rejected. *See, e.g., McDougall* v. *Donovan*, 539 F. Supp. 596, 598 (N.D. Ill. 1982).[6] If knowledge of the fiduciary's violation was required for a pre-*Mertens*, dependent, knowing-participation claim, it surely must be required for any (hypothetical) dependent "§ 1106 claim" against a nonfiduciary party-in-interest that might exist after *Mertens* and *Spink*. One cannot fairly construe *Mertens* — with its emphasis on restricting remedies and rights of action — as *expanding* the circumstances under which a nonfiduciary party-in-interest can be liable by (implicitly) overruling pre-*Mertens* case law that required proof of *knowing* participation to impose liability on a nonfiduciary party-in-interest.

sible evidence in the district-court record. *See, e.g.*, Fed. R. Civ. P. 56(e); *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 255 (1986); *Behrens* v. *Pelletier*, 516 U.S. 299, 309 (1996); Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 3d § 2727 at 460 (1998).

[6] *McDougall*, in ruling that a nonfiduciary party-in-interest could be held liable for knowingly participating in a fiduciary's violation of § 1106, erroneously relied on a 1973 Senate committee report on a proposed bill (S. 4) — which was *not* enacted — that would have expressly authorized civil actions against "any person" who received plan assets (Sal. C.A. App. 128-29). *See id.* 145-46, *cited in* 539 F. Supp. at 598. The

Furthermore, even a *co-fiduciary* who participates in a prohibited transaction caused by another fiduciary can be liable only if such co-fiduciary "*know[s] such act or omission [by the other fiduciary] is a breach*" (§ 1105(a)(1)) (emphasis added) — *i.e.*, knows that the fiduciary is violating § 1106. *See also* House Conference Report No. 93-1280, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5080 (to be liable, the co-fiduciary, among other things, "must know that he participated in the act that constituted a breach, *and must know that it was a breach*") (emphasis added). Plainly, civil liability should not be imposed upon a *non*fiduciary party-in-interest upon less proof than required to hold a co-fiduciary liable.

2. Ameritech did not offer admissible evidence that Salomon knew that a fiduciary was violating § 1106(a). Ameritech offered *no* admissible evidence that Salomon knew at the time of the transactions (1987-1989) that a fiduciary of APT was violating § 1106(a). *See* Sal. C.A. App. 395-97. At the time, *no one* thought that the transactions violated § 1106, although Ameritech and NISA were fully aware of Salomon's business dealings with APT as well as these transactions. *See, e.g.*, Sal. C.A. App. 359, 393-406, 589-91, 594, 611, 616, 627, 632-35, 637-39, 649, 662, 670. Indeed, Ameritech's 1987, 1988 and 1989 filings

1973 Senate reports (Sal. C.A. App. 145, 148) concerning proposed (but *not* enacted) bills (*id.* at 126-30; 131-43) are irrelevant to whether ERISA *as enacted* creates a right of action against a nonfiduciary.

with the Department of Labor represented that there were *no* non-exempt prohibited transactions. *See* Sal. C.A. App. 397-408, 735-40, 778-84. That Ameritech and NISA did not at the time believe the transactions violated § 1106 underscores the total absence of evidence that *Salomon* somehow knew this (to say nothing of the absence of evidence that Salomon knew that Ameritech Corp. or NISA knew that *they* were violating § 1106).[7]

II. FURTHER CONSIDERATION BY THE COURTS OF APPEALS WOULD BE APPROPRIATE BEFORE REVIEW BY THIS COURT.

The decisions of other circuits recognizing a private cause of action against nonfiduciary parties-in-interest reflect different conceptions of the nature of, and basis for, the cause of action, and none of them have concretely defined its elements. Particularly since, as discussed above, the procedural history and current posture of this case in any event com-

[7] As to other matters, Ameritech errs in asserting that "there is no dispute" that, if a § 1132(a)(3) action is available, the equitable remedies that can be obtained include restitution. *See* Pet. 13 n.9. The cause of action posited by Ameritech — a "direct" statutory tort against a nonfiduciary, *not* an equitable action for participation in a fiduciary breach — would be legal in nature. As the Seventh Circuit noted in an earlier case, "restitution is a legal remedy when ordered in a case at law and an equitable remedy ... when ordered in an equity case." *Reich* v. *Continental Casualty*, 33 F.3d 754, 756 (7th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995) (citing, *e.g.*, Dobbs, *Law on Remedies* §§ 1.2, 4.1(1), 4.1(3), 4.2-4.3 (2d ed. 1993)). Ameritech has articulated no theory under which its putative "direct" cause of action would constitute "an equity case". Also, even if restitution were deemed to be an equitable remedy here, were this action to be tried, Salomon would assert other defenses to the availability of such a remedy. Furthermore, Salomon also argued in the alternative in the Seventh Circuit that *if* a nonfiduciary party-in-interest can be held liable under § 1106(a), it is entitled to seek contribution from a fiduciary that violated § 1106. Recognizing that the Court of Appeals did not reach this argument, and that it does not constitute an independent grounds for affirmance, Salomon does not press this argument now, but reserves it should it become germane in the future.

promise its utility as a vehicle for review, it is respectfully submitted that the potential benefit from observing how the other circuits will respond to the Seventh Circuit's recent decision — and how any future cases that still uphold the disputed cause of action define its elements — further militates against granting *certiorari* here.

The decisions of the other circuits reflect an incomplete analysis and leave unresolved a number of questions:

- *How can a court uphold a private cause of action against nonfiduciary parties-in-interest if the legislative history shows that Congress considered providing that cause of action but opted not to?* Only the Tenth Circuit has even partially addressed the legislative history relied upon by the Seventh Circuit, and even the Tenth Circuit did not discuss the explicit recommendation of the Conference Committee staff that ERISA "*not* provide civil liability for parties-in-interest" (RA27 (emphasis added)). *Compare Harris Trust*, App. 11a-12a, *with Reich* v. *Stangl*, 73 F.3d 1027, 1032-34 (10th Cir.), *cert. denied*, 519 U.S. 807 (1996).

- *What level of scienter is required for nonfiduciary liability?* Only the Ninth Circuit has directly addressed this question, but its holding that a party-in-interest may be liable "regardless of his lack of notice or knowledge" is limited to "gratuitous transferees" — as opposed to transferees who exchange value. *See Landwehr* v. *DuPree*, 72 F.3d 726, 734-35 (9th Cir. 1995).

- *What precisely is the operative theory of nonfiduciary liability?* Is it: (a) knowing participation in a *fiduciary's* breach of the *fiduciary's duty* under § 1106; (b) breach of the party-in-interest's *own* (supposed) *duty* under § 1106; or (c) a theory that, under § 1132(a)(3), a nonfiduciary may be subject to equitable remedies even though it breached *no duty* under § 1106? The other circuits are far from clear as to which theory they employ,

and none of them has addressed the impact of *Lockheed* v. *Spink* on its theory of liability. *See* pp. 8-10, *supra*.

There is no countervailing urgency in establishing uniformity between circuits that warrants granting *certiorari* in *this* case in its current posture. The potential for uniformity in denying the right of action is not by itself reason to grant *certiorari*. Indeed, in the past several years, this Court has declined the opportunity to review the question presented here — or variations of it — at least three times. *See Fickling* v. *Herman*, 119 S. Ct. 1030 (1999), *denying cert. from* 140 F.3d 1413 (11th Cir. 1998); *Stangl* v. *Reich*, 519 U.S. 807, *denying cert. from* 73 F.3d 1027 (10th Cir.) (1996); *Reich* v. *Continental Cas.*, 513 U.S. 1152 (1995), *denying cert. from* 33 F.3d 754 (7th Cir. 1994). Conversely, were this Court to conclude that the posited private cause of action should be inferred, uniformity might be achieved only if this Court were to proceed further and define its elements, including the knowledge requirement (an issue Salomon raised below, but which, in this case arising from a § 1292(b) interlocutory appeal, the Court of Appeals did not reach).

III. THE SEVENTH CIRCUIT'S DECISION DOES NOT COMPROMISE ERISA ENFORCEMENT.

The Seventh Circuit's decision does not create the crisis of ERISA enforcement that Ameritech suggests. *See* Pet. 20-22. *First*, insofar as this case is concerned, *if* § 1106 was violated, there has been no showing that the responsible fiduciaries, Ameritech Corp. and NISA, could not compensate APT for any losses, and Ameritech Corp., with its $20 billion in assets, clearly can. *See* Sal. C.A. App. 353, 789. Furthermore, Ameritech's pension plans are employer-funded, defined benefit plans; Ameritech Corp. is obliged to pay fixed benefits irrespective of the investment performance of APT, and any losses suffered by APT based on poor investment performance are borne by Ameritech Corp., not retirees. *See* Sal.

C.A. App. 354. Specifically, any losses that APT may have suffered with respect to the participation-interest investments did not cost any Ameritech employee or retiree any money. *See id.*

Second, viewing the matter in a broader perspective, even though there is no private cause of action under ERISA against nonfiduciary parties-in-interest, suit can still be brought on behalf of plans under ERISA against any fiduciaries who violate § 1106 and co-fiduciaries who violate § 1105, as well as potentially against other persons under other federal laws or under state law, particularly if there is fraudulent conduct. In addition, as Ameritech recognizes (Pet. 21 n.14), there still exists the potential in appropriate cases for the Government to seek to undo prohibited transactions through (where applicable) IRC § 4975 excise taxes or § 1132(i) administrative penalties (each of as much as 100% of the amount involved).[8]

Third, allowing private civil actions *only* against fiduciaries may do more to further ERISA's aims than allowing suits against both fiduciaries and nonfiduciary parties-in-interest. If a fiduciary can shift liability for a violation of § 1106 to a *non*fiduciary party-in-interest, the force of the statutory proscription that a "fiduciary ... shall not cause" a plan to engage in a prohibited transaction could be diluted. In many cases, the fiduciary that caused the alleged § 1106(a) violation, or a co-fiduciary whose conduct violated § 1105, also controls who is sued. As this case demonstrates, fiduciaries with that control will rarely sue themselves: Here, substantial evidence indicates that fiduciary Ameritech Corp. caused APT to buy

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[8] As noted (p. 3, *supra*), Salomon disputes any allegation that it was a party-in-interest or that the transactions were nonexempt prohibited transactions, and Salomon disputes the applicability here of either § 4975 or § 1132(i). Of course, whether a remedy in fact exists in a particular case or against a particular party does not detract from the fact that Congress did provide expressly for certain remedies but omitted others. *See* pp. 20, 22-25, *infra*.

the participation interests.[9] Yet Ameritech Corp. is a plaintiff, not a defendant, and fiduciary NISA is not a party. By this lawsuit, APT's fiduciaries are attempting to shift to Salomon, a nonfiduciary, responsibility for an alleged violation of § 1106 that Congress placed squarely on them.

Finally, whether providing a private cause of action against nonfiduciaries would better promote "a basic policy goal" of ERISA (Pet. 21) is legally irrelevant. The *Mertens* plaintiffs likewise argued that, if plans cannot hold nonfiduciaries liable for participation in fiduciary breaches, plans might have no remedy, and that a construction of ERISA under which a plan lacked remedies that it had at common law was contrary to ERISA's "basic purpose" of protecting pension plans. *See* 508 U.S. at 261. But this Court held that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration. This is especially true with legislation such as ERISA...." *Id.* at 261-62 (internal citation omitted).

IV. THE SEVENTH CIRCUIT'S DECISION ADHERES TO THE STATUTORY LANGUAGE AND CONTEXT, THE LEGISLATIVE HISTORY, AND THIS COURT'S PRECEDENTS.

A. The statutory language

The question presented turns on the language of § 1106(a). The other section Ameritech refers to in its question presented, § 1132(a)(3), permits civil actions for "other appropriate equitable relief" to redress "any act or practice which violates" subchapter I of Title 29. But as the Seventh Circuit recognized, § 1132(a)(3) "only serves to provide a private cause of action for violations of ERISA; it does not expand the scope of liability under the Act". App. 8a; *see also*

[9] *See, e.g.*, Sal. C.A. App. 368-93, 461-66, 593, 595-99, 604, 607-10, 612-13, 639, 668-69, 682-83, 687-92, 694-95, 724-28, 741-42, 758-68.

Mertens v. *Hewitt*, 508 U.S. at 253-55 & n.5. And even Ameritech acknowledged in the Seventh Circuit that whether a private cause of action exists against a nonfiduciary party-in-interest "depends entirely on the meaning of § 1106(a)". Brief of Appellees at 18. The question then is: Upon whom does § 1106 impose a duty to avoid prohibited transactions, violation of which may give rise to civil liability?

The text of § 1106(a) leaves no room to doubt that only a fiduciary can violate it, for it prohibits fiduciary conduct only: "[a] *fiduciary* with respect to a plan *shall not cause* the plan to engage in a transaction, if *he* knows or should know that such transaction constitutes" a nonexempt prohibited transaction (emphasis added). Section 1106(a) does *not* contain any comparable prohibition addressed to nonfiduciary parties-in-interest. No words of duty or prohibition, such as "shall not" are applied to nonfiduciary parties-in-interest. Further, § 1106(a) contains an express standard of culpability for fiduciaries who cause prohibited transactions, but says nothing about any culpability standard for *non*fiduciary parties-in-interest — an omission that makes sense only if § 1106 does not impose duties on nonfiduciary parties-in-interest. The "act" that "violates" § 1106 — and thus may potentially be subject to civil suit under § 1132(a) — can only be the act that § 1106 prohibits: a "fiduciary['s] ... caus[ing] the plan to engage in [the] transaction." As the Seventh Circuit observed, the "mere fact that § 1106 *mentions* 'parties in interest' when it describes the transactions that fiduciaries must avoid does not mean that parties in interest are liable when a fiduciary does engage in a prohibited transaction." App. 8a.

The Seventh Circuit's decision is faithful to the plain meaning of § 1106, and thus faithful to this Court's precedents — which consistently underscore that statutes are to be applied as written. As this Court reiterated earlier this year in another ERISA case: "[I]n any case of statutory construction, our analysis begins with 'the language of the statute.' ... And

where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft* v. *Jacobson*, 119 S. Ct. 755, 760 (1999); *see also, e.g., Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 176-78 (1994) (since the text of § 10(b) "does not itself" encompass aiders and abettors, "that conclusion resolves the case"); *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992) ("we have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says").

Moreover, where — as here (*see* Point III, *supra*) — the statutory scheme expressly provides alternative methods of addressing the allegedly prohibited conduct, "'*it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under' the statute.*" *Meghrig* v. *KFC Western*, 516 U.S. 479, 487-88 (1996) (*emphasis added*). Rather, "'[i]t is an elemental cannon of statutory construction that *where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.*'" *Id.* (emphasis added).

These general principles have particular application in ERISA cases: this Court has pronounced its "*unwillingness to infer causes of action in the ERISA context*, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that *Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.*'" *Mertens*, 508 U.S. at 254 (quoting *Massachusetts Mut. Life Ins.* v. *Russell*, 473 U.S. 134, 146-47 (1985)) (emphasis added).

In place of simply reading § 1106 as it is written, Ameritech urges an alternative interpretation — unsupported by the text of the statute — based on multiple flawed assertions. *See* Pet. 12-13. *First*, Ameritech asserts that a party-in-interest "*necessarily*" is a counter-party to a prohibited transaction. Pet. 12. But the transactions enumerated in §§ 1106(a)(1)(D)-(E) and 1106(b) do *not* necessarily involve a party-in-interest

counter-party.[10] *Second*, even if (contrary to fact) parties-in-interest necessarily were counter-parties to all prohibited transactions, Ameritech's further assertion that "prohibiting the transaction from the fiduciary's side necessarily entails prohibiting it from the party in interest's side" (Pet. 12) is pure *ipse dixit*. Prohibiting conduct by the fiduciary alone — who has the power to cause the plan to engage in the transaction — makes eminent sense. In various other contexts, the United States Code contains "prohibited transaction" provisions directed to only one party to a transaction.[11] And the Congressional decision to subject only a fiduciary to civil liability is particularly logical given what otherwise would be the spectre of fiduciaries, through their choice of whom to sue, seeking to shift to nonfiduciaries responsibility for § 1106 violations. *See* pp. 17-18, *supra*. *Third*, Ameritech's assertion that "[i]t is the *transaction* that is prohibited" (Pet. 12) ignores that prohibitions are not abstractions — rather, of necessity, prohibitions regulate the behavior of a class of persons. In § 1106 — one component of Part 4, "Fiduciary Responsibil-

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10 Indeed, in cases Ameritech itself relies upon, the Third Circuit upheld a cause of action against nonfiduciary *non*-parties-in-interest for participating in a prohibited transaction. *See Reich* v. *Compton*, 57 F.3d 270, 286-87 (1995) (§ 1106(a)(1)(D) transaction). And the Fourth Circuit's decision, which upheld a cause of action against nonfiduciary defendants for "knowing participation in an ERISA fiduciary's breach of [§ 1106]", does not focus on the party-in-interest status of the defendants, and cites approvingly to *Compton*'s holding that *non*-parties-in-interest may be held civilly liable for prohibited transactions. *See LeBlanc* v. *Cahill*, 153 F.3d 134, 151-53 (4th Cir. 1998) (§ 1106(b) transaction).

11 *See, e.g.*, 12 U.S.C. § 371c-1(b)(1)(A) ("Prohibited transactions ... A member bank or its subsidiary ... shall not purchase as fiduciary any securities ... from any affiliate...."); 15 U.S.C. § 80b-6(1) ("Prohibited transactions by investment advisers[:] It shall be unlawful for any investment adviser to ... defraud any client...."); 22 U.S.C. § 2780(b)(1)(A) ("Prohibited transactions by United States Persons ... A United States Person may not take any of the following actions: Exporting any munitions item to any country described in subsection (d) of this section.").

ity" — Congress chose to regulate fiduciaries: "A fiduciary ... shall not".

B. The statutory context

Subchapter I, Subtitle B, Part 4 of ERISA concerns "Fiduciary Responsibility"; it specifies various duties of fiduciaries and provides that fiduciaries may be liable for their breach. Thus, § 1104 sets forth certain basic fiduciary duties: "a fiduciary shall discharge his duties with respect to a plan ..." § 1104(a)(1). Section 1109 expressly imposes civil liability on fiduciaries: "a fiduciary ... who breaches any of the ... duties imposed upon *fiduciaries* by this subchapter shall be personally liable" to make good any losses suffered by the plan "and to restore to [the] plan any profits" such fiduciary made using the plan's assets, and is "subject to such other equitable or remedial relief as the court may deem appropriate". § 1109(a) (emphasis added). Section 1105 expressly provides for liability of co-fiduciaries: "a fiduciary ... shall be liable for a breach of fiduciary responsibility of another fiduciary...." § 1105(a). But §§ 1104, 1105 and 1109 apply only to fiduciaries. No provision of ERISA imposes comparable express duties or civil liability on nonfiduciary parties-in-interest.

Section 1106 appears in Part 4, the "Fiduciary Responsibility" part of ERISA. *Cf. Hughes Aircraft* v. *Jacobson*, 119 S. Ct. 755, 760, 763 (1999) (referring to § 1106 as one of ERISA's "fiduciary provisions"); *Massachusetts Mut. Life Ins.* v. *Russell*, 473 U.S. at 143 n.10 ("ERISA establishes duties of loyalty and care for fiduciaries. With regard to loyalty, the principal provision is [§ 1106]"). And the linguistic parallel between § 1104 and § 1106 confirm what § 1106's words convey: § 1106 "simply describes another variety of fiduciary breach" (App. 7a), and does *not* impose duties upon *non*-fiduciary parties-in-interest.

It is also instructive that Congress did expressly address what class of persons should bear civil liability for partici-

pation in a fiduciary's breach of duty — and provided that only co-fiduciaries would have such liability. *See* § 1105(a); *Mertens*, 508 U.S. at 254; *see also Central Bank*, 511 U.S. at 184 ("The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere."). Plainly, "[i]f Congress had wanted to place remedial power against nonfiduciaries in the hands of private parties it would have done so more explicitly as it did in the case of fiduciaries and in the case of cofiduciaries." App. 9a.

The other statutory provisions to which Ameritech points (Pet. 13-15) only undercut its position:

Section 1108. That § 1108(a) authorizes exemptions for "any fiduciary or transaction, or class of fiduciaries or transactions" does not indicate that it is the *transaction* that is prohibited. Rather, this indicates only that Congress chose to permit the Secretary of Labor to exempt either particular fiduciaries or particular transactions (regardless of what fiduciaries were involved). And why would §§ 1108(a) and (c) refer only to fiduciaries, *not* nonfiduciaries as well, if § 1106 imposed duties upon both fiduciaries and nonfiduciary parties-in-interest?

Section 1132(i). Section 1132(i) provides for *administrative* assessment of civil penalties by the Secretary of Labor in the case of a prohibited transaction "by a party in interest", which the Secretary may sue to collect under § 1132(a)(6); § 1132(i) does not authorize private causes of action. In addition, § 1132(i) by its terms "shall not apply" in the case of tax-qualified plans. Ameritech's plans are tax-qualified (Sal. C.A. App. 795), so § 1132(i) does not apply and cannot create any duty here. Moreover, as the Seventh Circuit put it, "[t]he fact that Congress saw fit to allow the Labor Department to impose such a penalty ... only makes the absence of a specific provision imposing civil liability on parties in interest all the more striking". App. 9a.

IRC § 4975. Under § 4975, the IRS may impose excise taxes of up to 100% on certain parties-in-interest (including certain nonfiduciaries) who participate in nonexempt prohibited transactions with tax-qualified plans. But IRC § 4975 (ERISA § 2003) was enacted as part of *Title II* (*not* Title I) of ERISA, and § 4975 is *not* included in subchapter I of Title 29. *See* P.L. 93-406, *reprinted in* 1974 U.S.C.C.A.N. 935, 935-37. Therefore, "violations" of § 4975 by definition cannot be the predicate for a private action under § 1132(a)(3), which is limited to violations of Title I/subchapter I.[12] Furthermore, § 4975(h) merely concerns administrative coordination between the Secretaries of Labor and Treasury. Ameritech's § 4975(h) argument assumes, *inter alia*, that the *only* means by which the Secretary of Labor could ever seek a correction of *any* transaction would be by civil suit under § 1132(a)(5) against a nonfiduciary party-in-interest. Yet some prohibited transactions do not involve receipt of plan assets by a nonfiduciary (*e.g.* § 4975(c)(1) (E) and (F)), and even where a nonfiduciary is involved the Secretary of Labor could seek correction *administratively* through use of the threat of IRS assessment of excise taxes. In sum, Congress' choice to employ in its enforcement scheme the spectre of excise taxes under § 4975 on certain parties-in-interest only highlights the absence of a provision imposing civil liability upon parties-in-interest.

C. The legislative history

Congress specifically focused on whether there should be a private right of action against nonfiduciary parties-in-interest who participate in prohibited transactions and decided that

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[12] 29 U.S.C. § 1132(a)(3), as codified, refers to violations of "any provision of this subchapter", meaning subchapter I, "Protection of Employee Benefit Rights" (which is Title I of ERISA as enacted, *see* P.L. 93-406, *reprinted in* 1974 U.S.C.C.A.N. 935-36, 939); ERISA § 502(a)(3), as enacted, refers to violations of "any provisions of this title" (again referring to ERISA Title I, *see id., reprinted in* 1974 U.S.C.C.A.N. at 935-36, 1011).

there should *not*. The House bill limited liability to fiduciaries. *See* RA23-26. By contrast, the Senate bill would have imposed civil liability on parties-in-interest for damages and disgorgement of profits (providing that "[a]ny party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies" "shall be personally liable" to make good any losses to the fund and "to pay to the fund any profits realized by him from such transaction"), and authorized civil actions "against *any person* who has transferred or *received* any of the assets of a plan or fund in violation of the fiduciary requirements" of the Act. RA21-22 (emphasis added).

The Conference Committee staff recommended that the conferees "adopt the approach of the House bill and *not provide civil liability for parties-in-interest*". RA27 (emphasis added); *see also* House Conference Report No. 93-1280, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107; App. 12a. Accordingly, under the conference agreement enacted into law, the "labor provisions" (Title I) "provide general standards of conduct for fiduciaries, and make certain specific transactions 'prohibited transactions' which *plan fiduciaries* are not to engage in". *Id.* at 5076 (emphasis added). Also, under the "labor provisions" "a fiduciary who breaches the fiduciary requirements" is to be "personally liable" for any losses, or for disgorgement of profits made using plan assets, whereas a "party-in-interest" is potentially subject *only* to an administrative penalty or excise tax. *See id.* at 5100-01; *see also id.* at 5171, 5188.

Ameritech argues that the Seventh Circuit "ignored" legislative history showing that the words "other appropriate equitable relief" were inserted into the final version of § 1132(a)(3). Pet. 18-19. But it makes no sense to conclude that, although the Conferees adopted the House approach and omitted the express civil liability provisions of the Senate bill, still Congress intended, by insertion of the words "other

appropriate equitable relief" in § 1132(a)(3), and without even comment in the legislative history, to implicitly impose civil liability on nonfiduciary parties-in-interest. And any suggestion that the language of § 1132(a)(3) was intended to expand the scope of prohibited-transaction liability would contradict Ameritech's own position in the Court of Appeals that whether a private cause of action exists "depends entirely on the meaning of § 1106(a)". *See* p. 19, *supra*.

D. This Court's precedents

The Seventh Circuit's decision follows naturally from this Court's decisions in *Mertens* v. *Hewitt* and *Lockheed* v. *Spink*. *Mertens* makes clear that § 1132(a)(3) should not be read as creating a private right of action against a nonfiduciary that participates in a fiduciary's breach of duty because ERISA does not "*affirmatively authorize[ ]*" such a suit. *Id.* at 253-55 & n.5 (emphasis added). As this Court explained the following year in *Central Bank*: "While plaintiffs had a remedy against nonfiduciaries at common law, that was because 'nonfiduciaries had a *duty* to the beneficiaries not to assist in the fiduciary's breach.' No comparable *duty* [is] set forth in ERISA". 511 U.S. at 175 (emphasis added).

Further, *Mertens* expressly sets forth (i) that ERISA is "a 'comprehensive and reticulated statute,' the product of a decade of congressional study" (*id.* at 251); (ii) that provisions of subchapter I of ERISA that assign duties to fiduciaries, and that make fiduciaries liable for breach of those duties, by their terms apply only to fiduciaries — there are no equivalent provisions directed to nonfiduciaries (*id.* at 251-53); and (iii) that § 1132(a)(3) — one of "ERISA's 'six carefully integrated civil enforcement provisions'" (*id.* at 252) — should not be read to apply to nonfiduciaries in the absence of "explicit[ ]" provisions in subchapter I imposing duties and liabilities on such nonfiduciaries. *Id.* at 253-55 & n.5 (emphasis added).

The Seventh Circuit correctly read in its proper context language in *Mertens* on which Ameritech relies. *See* Pet. 17-18.

Mertens' statement that "professional service providers ... must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties, see § 502(i), 29 U.S.C. § 1132(i), or excise taxes, see 26 U.S.C. § 4975" (508 U.S. at 262) does *not* refer to civil liability. Rather, "disgorge assets and profits" refers to the "correction" of a prohibited transaction required to avert a 100% administrative penalty or excise tax (under § 4975(b)), and the "related civil penalties" or "excise taxes" refers to the 5% penalty or the excise tax under § 4975(a) to which the party-in-interest could still be subject. In other words, the Secretary of Labor or IRS can seek to force certain parties-in-interest to correct prohibited transactions "at peril of a ... penalty". *See* App. 9a-10a.

And *Mertens*' "parenthetical phrase 'assuming nonfiduciaries can be sued under [§ 1132(a)(3)]' was stating a big assumption — an assumption Justice Scalia had previously made clear that he and a majority of the Court were unwilling to make." App. 10a. Furthermore, *Mertens*' statement that "ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries" (508 U.S. at 253-54 & n.4) does not address the issue here: whether a nonfiduciary party-in-interest who enters into a prohibited transaction violates § 1106(a) and may be held civilly liable in a private suit. Even if ERISA "can be read" — in light of § 1132(i) or 26 U.S.C. § 4975 — "as imposing obligations upon nonfiduciaries", that does not mean that *§ 1106(a)* imposes any such obligation or that ERISA "affirmatively authorizes" (*id.* at 253-55 & n.5) *private actions* to impose *civil liabilities* upon nonfiduciaries — as opposed to the authorizations in §§ 1132(a)(6) and (i) and § 4975 for administrative penalties, suits to collect such penalties or excise taxes.

Moreover, subsequent to *Mertens*, this Court observed in *Spink* that: (1) these statements in *Mertens* "were in any event dicta"; and (2) even "[i]nsofar as [these statements] apply to [§ 1106(a)]" — which "was not at issue" in *Mertens* — these

statements "suggest liability for parties in interest *only* when a *violation* of [§ 1106(a)] has been established — which ... *requires* a showing that a *fiduciary caused* the plan to engage in the transaction in question". 517 U.S. at 889 n.3 (emphasis added).

In sum, *Mertens* makes clear that "where ERISA does not expressly impose a duty, there can be no cause of action". App. 8a. The Seventh Circuit correctly applied that principle in declining to infer a private cause of action here, since, "by its plain terms", § 1106 does not regulate nonfiduciary conduct, and "imposes no explicit duty on parties in interest". App. 7a; *see also* App. 12a-13a.

This Court in *Spink* likewise declined to impose nonfiduciary liability under § 1106. *Spink* declined to endorse the cause of action against the party-in-interest that the Ninth Circuit had articulated, and held that a prerequisite to any § 1106 claim is a showing that a fiduciary caused the plan to engage in the alleged prohibited transaction: "Unless a plaintiff can make that showing, *there can be no violation of [§ 1106(a)(1)] to warrant relief under the enforcement provisions*". 517 U.S. at 888-89 (emphasis added). *Spink* underscores that "the *only* transactions rendered *impermissible* by [§ 1106(a)] are transactions *caused by fiduciaries*" and that § 1106 "prohibits *fiduciaries* ...", "regulates the conduct of plan *fiduciaries*". *Spink*, 517 U.S. at 887-89 & n.3, 893 (emphasis added). Although *Spink* stated that the Ninth Circuit was "not necessarily wrong" in recognizing a cause of action against a nonfiduciary party-in-interest (517 U.S. at 889 n.3), "'not necessarily wrong' does not mean 'right'", as the Seventh Circuit observed. App. 10a.[13]

[13] Two other ERISA decisions Ameritech relies on are inapposite. *Varity* v. *Howe*, 516 U.S. 489 (1996), involved the entirely different issue of who can sue as a *plaintiff* under § 1132(a)(3). The *Varity* defendant was a fiduciary sued for violating § 1104(a), and *Varity* did *not* address whether nonfiduciary defendants can be sued under § 1132(a)(3). *Commissioner* v. *Keystone*, 508 U.S. 152, 160 (1993), *was a tax case under IRC § 4975*, and did *not* discuss which parties have duties under § 1106 that give rise to civil liability. As discussed above, the existence of § 4975 only highlights the congressional choice not to impose civil liability upon parties-in-interest. *See* p. 24, *supra*. The Court's statement that "Congress' goal was to bar categorically a transaction that was likely to injure the pension plan" indicates only that § 1106(a)(1)(A) applies to all property transfers by plan sponsors to plans that satisfy a funding obligation, not merely to transfers of property encumbered by debt, as the Tax Court and Fifth Circuit had held. *See* 508 U.S. at 156-57, 160-61.

CONCLUSION

The Petition for Writ of *Certiorari* should be denied.

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Respectfully submitted,

/s/ PETER C. HEIN
Peter C. Hein
Counsel of Record
Andrew C. Houston
Michael A. Charish
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

William F. Conlon
Richard B. Kapnick
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for Respondents

TITLE 29. LABOR
CHAPTER 18—EMPLOYEE RETIREMENT
INCOME SECURITY PROGRAM
SUBCHAPTER I—PROTECTION OF EMPLOYEE
BENEFIT RIGHTS
SUBTITLE B—REGULATORY PROVISIONS
PART 4—FIDUCIARY RESPONSIBILITY

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

* * *

§ 1105. Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b) Assets held by two or more trustees

(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees –

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any

person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 1104(a)(1) of this title—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

(d) Investment managers

(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

§ 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the

interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

§ 1108. Exemptions from prohibited transactions

(a) Grant of exemptions

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this chapter. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 1106(a) or 1107(a) of this title, the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 1106(b) of this title unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) Enumeration of transactions exempted from section 1106 prohibitions

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of Title 26) in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of Title 26.

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the estab-

lishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 1107(d)(6) of this title), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 1107(d)(5) of this title).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company.[1] or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 1344 of this title (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of subchapter III of this chapter.

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 1411 of this title.

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1 So in original. The period probably should be a comma.

(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if—

(A) the requirements of paragraphs (1) and (2) of subsection (e) of this section are met with respect to such stock,

(B) on the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 1107(d)(5) of this title as then in effect), and

(C) such stock does not constitute a qualifying employer security (as defined in section 1107(d)(5) of this title as in effect at the time of the sale).

(13) Any transfer in a taxable year beginning before January 1, 2001, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer permitted under section 420 of Title 26 (as in effect on January 1, 1995).

(c) Fiduciary benefits and compensation not prohibited by section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from—

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are par-

ticipants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

* * *

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

TITLE 29. LABOR
CHAPTER 18— EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS
SUBTITLE B—REGULATORY PROVISIONS
PART 5—ADMINISTRATION AND ENFORCEMENT

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to

obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) of this section or under subsection (i) or (*l*) of this section;

* * *

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up

to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 1021(f)(1) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

* * *

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any

action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

* * *

(l) Civil penalties on violations by fiduciaries

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from

a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

S. 1179, 93d Cong., 1st Sess. § 501(c)(3), (d)(17) (1973) (not enacted)

Reprinted in Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 1, at 780, 945, 949, 950, 955-56 (1976) (also included at Sal. C.A. App. 131, 132, 136, 137, 142-43)

TITLE V—FIDUCIARY STANDARDS

Part A—FIDUCIARY STANDARDS FOR PLAN OFFICERS AND EMPLOYEES

SEC. 501 QUALIFICATIONS AND RESPONSIBILITIES OF INDIVIDUALS

* * *

(c) FIDUCIARY RESPONSIBILITIES.—With respect to any fund established under an employee benefit plan to which this section applies, any person serving as a fiduciary—

* * *

(3) shall not participate in any transaction which is or would be a prohibited transaction under section 4973 of the Internal Revenue Code of 1954 if such section applied to the fund.

* * *

(d) CIVIL ACTIONS.—

* * *

(17) Any party in interest who participates in a transaction described in subsection (c)(3) knowingly, or with reason to

know that the transaction was a transaction to which that subsection applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction. For purposes of this paragraph, the term "party in interest" means a person described in section 4973(e)(1) of the International Revenue Code of 1954.

H.R. 2, 93d Cong., 2d Sess. §§ 511 (adding § 15(i)), 693 (as passed by the Senate on Mar. 4, 1974) (not enacted)

Reprinted in Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 3599, 3772, 3780, 3816-17 (1976) (also included at Sal. C.A. App. 166, 167, 175, 178-79)

FIDUCIARY STANDARDS

SEC. 15.

* * *

(i) Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction.

* * *

SEC. 693. ACTIONS TO REDRESS OR RESTRAIN VIOLATIONS OF FIDUCIARY DUTY.

Civil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation, or duty of a fiduciary, including but not limited to, the removal of a fiduciary who has failed to carry out his duties and the removal of any person who is serving in violation of the requirements of section 15(h) of the Welfare and Pension Plans Disclosure Act or against any person who has transferred or received any of the assets of a plan or fund in violation of the fiduciary requirements of the Welfare and Pension Plans Disclosure Act or in violation of the document or documents governing the establishment or operation of the fund, may be brought by any participant or beneficiary of any employee benefit plan or fund subject to the Welfare and Pen-

sion Plans Disclosure Act in any court of competent jurisdiction, State or Federal, or the United States District Court for the District of Columbia, without respect to the amount in controversy and without regard to the citizenship of the parties. Where such action is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found. Such actions may also be brought by a participant or beneficiary as a representative party on behalf of all participants or beneficiaries similarly situated. In all civil actions authorized by this Act or the Welfare and Pension Plans Disclosure Act, attorneys appointed by the Secretary shall represent the Secretary except as provided in section 518(a) of title 28, United States Code (relating to litigation before the Supreme Court of the United States).

H.R. 2, 93d Cong., 2d Sess. §§ 111(b), (d), (e), 503(e)
(as passed by the House on Feb. 28, 1974)

Reprinted in Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 3897, 3947, 3950-51, 3953-55, 4044, 4047 (1976) (also included at Sal. C.A. App. 150, 152, 155-56, 158-160, 162, 165)[1]

FIDUCIARY RESPONSIBILITY

SEC. 111.

* * *

(b) (1) A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) For the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

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[1] Respondents' Note: On March 6, 1994, the Senate ordered that there be printed additional copies of H.R. 2 as it passed the House of Representatives on February 28, 1974. It is this version of H.R. 2 that was reprinted in the *Legislative History of the Employee Retirement Income Security Act of 1974*. *See id.* at 3898. Thus, the printed version of H.R. 2 as passed by the House bears the caption: "IN THE SENATE OF THE UNITED STATES, March 6, 1974, ordered printed as passed by the House, by unanimous consent." *Id.* For a summary of the sequence in which these bills were introduced and/or considered, see 120 Cong. Rec. 8851 (1974).

(C) by diversifying the investments so as to minimize the risk of large losses unless under the circumstances it is prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as is consistent with this title.

(2) Except as permitted under subsection (a)(2) of this section, a fiduciary with respect to a plan shall not—

(A) deal with the assets of the plan for his own account,

(B) in his individual or any other capacity act in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries,

(C) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan,

(D) permit the transfer of any property of the plan to or its use by any person known to be a party in interest, except in return for no less than adequate consideration, or

(E) permit the acquisition of any property or services from any person known to be a party in interest, except in exchange for no more than adequate consideration.

* * *

(d) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the fund resulting from each breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the fund by the fiduciary and shall be subject

to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 113 of this Act.

(e) All assets of any employee benefit plan (other than any contract for the payment of annuities which is guaranteed by an insurance company and not issued to a trustee of the plan) shall be held in trust by one or more trustees. Such trustee or trustees shall either be named in the trust instrument or appointed by the administrator or administrators, and, upon acceptance of their appointment, shall have exclusive authority and discretion to manage, and exclusive control of, the assets of the plan (subject to proper directions of the administrator which are made under the terms of the plan and which are not contrary to this title and except to the extent that authority to mange, acquire, or dispose of assets of the plan is delegated to one or more investment managers). If the assets of a plan are held by two or more trustees—

(1) each shall use reasonable care to prevent a cotrustee from committing a breach, notwithstanding language to the contrary in the trust agreement; and

(2) they shall jointly manage and control the assets of the trust, except that nothing in this paragraph (2) shall preclude any agreement authorized by the trust instrument allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this paragraph (2) either individually or as a trustee for any loss resulting to the fund arising from the acts or omissions to act on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated, unless the trustee to whom the responsibilities, obligations, or duties were not allocated participated knowingly in the activities constituting a breach of the

specific responsibilities, obligations, or duties allocated to any other trustee.

* * *

ENFORCEMENT

SEC. 503.

* * *

(e) Civil actions under this title may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (b) of this section, or

(B) to recover benefits due him under the terms of his plan or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 111(d); or

(3) by the Secretary, or by a participant, beneficiary, or fiduciary to enjoin any act or practice which violates any provision of this title.

Summary of Differences Between the Senate Version and the House Version of H.R. 2–To Provide for Pension Reform, committee prints prepared for the use of the Senate and House conferees on H.R. 2, Committee Print No. 1, Pt. 3, p. 9, 93d Cong., 2d Sess. (1974)

Reprinted in Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 5249, 5259 (1976) (also included at Sal. C.A. App. 180, 181)

9. Civil Liability

House bill.—

(1) Fiduciaries who breach any of their obligations under the bill are to be personally liable to the plan for losses resulting from the breach and for profits made through the use of plan assets, and are to be subject to other appropriate equitable relief, including removal.

(2) Fiduciaries are not to be liable for any breach committed before they became fiduciaries or after they cease to be fiduciaries.

Senate amendment.—This provision is included only in the Labor Act amendment.

(1), (2) Substantially the same as the House bill.

(3) Additionally, parties-in-interest who knowingly participate in a prohibited transaction, or had reason to know it was a prohibited transaction, are to be personally liable for losses sustained by the plan or for profits they realized from the transaction.

Staff comment.—

(1), (2) Substantially the same in both bills.

(3) The conferees may wish to adopt the approach of the House bill and not provide civil liability for parties-in-interest.[1]

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[1] Not all the staff agree with this suggestion.